NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN BURRELL, Plaintiff - Appellant, v. MIKE MCILROY; et al., Defendants - Appellees.	No. 02-15114 D.C. No. CV-99-01612-KJD MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted September 13, 2004
San Francisco, California

Before: OAKES[**], KLEINFELD, CALLAHAN, Circuit Judges.

Stephen Burrell ("Burrell") appeals the district court's grant of summary judgment on behalf of various officers of the Las Vegas Metropolitan Police

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable James L. Oakes, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

Department in this 42 U.S.C. § 1983 action. This court reviews the grant of summary judgment de novo, and may affirm on any basis supported by the record. *Johnson v. County of Los Angeles*, 340 F.3d 787, 791 (9th Cir. 2003); *Hell's Angels Motorcycle Corporation v. McKinley*, 360 F.3d 930, 931 n.1 (9th Cir. 2004). We have jurisdiction under 28 U.S.C. § 1331, and we affirm.

Burrell, who was suspected of illegally possessing weapons and narcotics, was under surveillance by officers of the Las Vegas Metropolitan Police Department. On February 4, 1999, Burrell left his apartment at 1750 Karen Avenue and drove to his 1500 Karen Avenue apartment.

Burrell alleges that Detective Rector followed him to the second apartment, where he stopped Burrell in his car, and forcibly removed him from the car at gunpoint. Burrell further contends that Rector handcuffed Burrell, read him his *Miranda* rights, and later informed him he was under arrest for suspicion of being under the influence of a controlled substance. Rector, however, testified that he contacted Burrell and then detained him.

Burrell was then transported to the 1750 Karen Avenue apartment. Although Burrell refused to allow the officers to conduct a search, he agreed to allow them to enter while they waited for a warrant to be issued. After the officers

were notified by phone that a search warrant had been issued, they searched Burrell's apartment.

While the search was being conducted, police officers were admitted to the 1500 Karen Avenue apartment by Courtney Johnson, Burrell's girlfriend at the time. Johnson provided oral and written consent for the officers to search. The searches at the two residences yielded a .38 caliber revolver and a shotgun as well as 2.73 grams of cocaine. Burrell was subsequently charged with two counts of being a felon in possession of a firearm and for possession of cocaine with intent to distribute. He was indicted by a federal grand jury of being a convicted felon in possession of a firearm on May 13, 1999.

On December 8, 1999, Burrell sued the officers for violating his Fourth Amendment rights. The district court granted the officers' motion for summary judgment, finding that the officers had probable cause to arrest Burrell, and that the search of his two apartments did not violate the Fourth Amendment. Burrell appeals, contending that the district court erred in granting the officers summary judgment.

He first argues that Detective Rector used excessive force and falsely arrested him outside the 1500 Karen Avenue apartment. The government,

however, asserted in its briefs that Rector had reasonable suspicion to detain Burrell and, even assuming the encounter was an arrest, probable cause as well.[1]

Assuming, without deciding, that Burrell can establish a Fourth Amendment violation, we nonetheless affirm the district court's grant of summary judgment.[2] We find that a reasonable officer in Rector's position would reasonably have believed that he could properly detain Burrell and to use force in doing so. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.")

Detective McIlroy noted in the arrest report that the officers had reason to believe that Burrell had shot a girlfriend at a home in an incident in December of

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[1] During oral argument, however, the government conceded that Detective Rector would not have had probable cause to arrest Burrell at that time.

[2] Although the dissent discusses whether there was a proper arrest, we do not characterize the incident as an arrest or a detention, or determine whether it was supported by probable cause or reasonable suspicion. Rather, we hold only that under the totality of the circumstances, Burrell has not shown that a reasonable officer would have known that he was violating Burrell's Fourth Amendment rights as required by the second prong of the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001).

1998, and that Burrell was armed.[3] These beliefs are not disputed. Because the officers were working in close concert, a court may consider the collective knowledge of these officers in considering their beliefs concerning probable cause or reasonable suspicion. *See United States v. Bernard*, 623 F.2d 551, 561 (9th Cir. 1979) (reasoning that "the officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all") (quotation omitted). Accordingly, we find that Detective Rector is entitled to qualified immunity.

Burrell next argues that the district court erred in granting summary judgment to other officers as to the search of the 1750 Karen Avenue apartment. He contends that Fed. R. Crim. P. 41(d) requires federal officers, absent exigent circumstances, to deliver a warrant at the outset of a search. *See United States v. Gantt*, 194 F.3d 987, 1004 (9th Cir. 1999); *Ramirez v. Butte-Silver Bow*, 298 F.3d 1022, 1027 (9th Cir. 2002), *affirmed Groh v. Ramirez*, 540 U.S. 551 (2004). Burrell contends that the officers violated his Fourth Amendment rights when they

[3] The dissent questions whether the officers had reason to believe that Burrell was armed, but the sincerity of the officers' beliefs that Burrell was likely to be armed is undisputed. Accordingly, even if the underlying intelligence was faulty, so long as Detective Rector reasonably relied on the information and sincerely believed that Burrell was likely to be armed, he is entitled to immunity.

commenced the search after receiving telephonic confirmation of the warrant, but prior to the physical delivery of the warrant.

The parties dispute whether officers of the Las Vegas Metropolitan Police Department are, in fact, federal officers who are subject to this rule. Even assuming that the officers were subject to this requirement, the clearly established law at the time of the search would not have put a reasonable officer on notice of a potential constitutional violation. *See Saucier v. Katz*, 533 U.S. at 202.[4]

Finally, Burrell contends that the officers illegally searched his 1500 Karen Avenue property because the officers coerced Johnson into giving her consent. Johnson declared in an affidavit the officers informed her that a search warrant was on the way, and that she would get into trouble unless she let them search prior to the arrival of the warrant. This statement, however, contradicts her prior sworn grand jury testimony, where she testified that she freely consented and never mentioned that the officers threatened her, or that she felt coerced, in any way. *See*

[4] The incidents that form the basis for this action took place on February 4, 1999. This court's opinion in *Gantt*, holding that the federal rules require a search warrant to be delivered before a search is commenced, was not filed until June 7, 1999. Prior to *Gantt*, the prevailing law of the circuit was that the failure to serve a warrant at the outset of a search did not always violate the Fourth Amendment. *See United States v. Woodring*, 444 F.2d 749 (9th Cir. 1971); *Nordelli v. United States*, 24 F.2d 665 (9th Cir. 1928)

Leslie v. Grupo ICA, 198 F.3d 1152, 1159 (9th Cir. 1999) ("[A] court may disregard a 'sham' affidavit that a party files to create an issue of fact by contradicting the party's prior deposition testimony.")[5] In addition, there is no evidence in the record that Johnson was in custody or that the officers had their guns drawn at any time. *See United States v. Castillo*, 866 F.2d 1071, 1082 (9th Cir. 1988) (noting that a finding of voluntariness is based on the totality of the circumstances, and outlining factors relevant to this consideration). Therefore, the district court's grant of summary judgment on behalf of the officers is AFFIRMED.

[5] In her testimony to the grand jury, Johnson said that the police officers asked her if they could come in and possibly search the house, and "I was, like, sure." Johnson mentioned that, in talking to the officers, Detective Rector told her that they had just left the 1750 Karen Avenue apartment "but were waiting for a search warrant and, you know, if I didn't have a problem with them coming in and searching, and I told them I didn't have a problem with them coming in because there shouldn't have been something in the house."